INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of argument	7
Argument:	
The activity of the government agent in this case did not constitute entrapment or deny respondent due process	10
A. The decision below is inconsistent with any view heretofore recognized by this Court as to the nature of the defense of entrapment and should not be adopted	11
B. There was no violation of due process in this case	25
Conclusion	33

CITATIONS

Cases:	
Alderman v. *United States*, 394 U.S. 164	20
Andrews v. *United States*, 162 U.S. 420	28
Banks v. *United States*, 258 F. 2d 318, certiorari denied, 358 U.S. 886	30
Banks v. *United States*, 249 F. 2d 672	33
Benson v. *Carter*, 396 F. 2d 319	30
Cox v. *Louisiana*, 379 U.S. 559	27
Greene v. *United States*, 454 F. 2d 783	7, 23
Grimm v. *United States*, 156 U.S. 604	28

490-157—72——1

Cases—Continued

	Page
Hawthorne v. *State*, 43 Wis. 2d 82, 168 N.W. 2d 85	30
Johnson v. *United States*, 317 F. 2d 127	25
LaDent v. *Wolff*, 334 F. Supp. 64	30
Lewis v. *United States*, 385 U.S. 206	28, 29
Lopez v. *United States*, 373 U.S. 427	18, 21
Malinski v. *New York*, 324 U.S. 401	27
Masciale v. *United States*, 356 U.S. 386	17
Massiah v. *United States*, 377 U.S. 201	28
Osborn v. *United States*, 385 U.S. 323	18, 21, 28
People v. *Sinclair*, 30 Mich. App. 473, 186 N.W. 2d 767, reversed on other grounds, 387 Mich. 91, 194 N.W. 2d 878	30
People v. *Strong*, 21 Ill. 2d 320, 172 N.E. 2d. 765	24
People v. *Washington*, 81 Ill. App. 2d 162, 225 N.E. 2d 673	30
Raley v. *Ohio*, 360 U.S. 423	26, 27
Rochin v. *California*, 342 U.S. 165	27
Scriber v. *United States*, 4 F. 2d 97	24
Sherman v. *United States*, 356 U.S. 369	7, 9, 11, 14, 15, 16, 17, 18, 19, 21, 22, 23, 25, 29, 30
Simmons v. *United States*, 302 F. 2d 71	30
Sorrells v. *United States*, 287 U.S. 435	7, 8, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 29, 30
State v. *Kosai*, 27 Utah 2d 326, 495 P. 2d 1295	30
Trent v. *United States*, 284 F. 2d 286	20
Turner v. *United States*, 262 F. 2d 643	30
United States v. *Bueno*, 447 F. 2d 903	23
United States v. *Chisum*, 312 F. Supp. 1307	24
United States v. *Dillet*, 205 F. Supp. 980	24

Cases—Continued

	Page
United States v. *Knight*, C.A. 9, No. 72–2031, decided October 16, 1972	18
United States v. *Roett*, 172 F. 2d 379, certiorari denied, 336 U.S. 960	25
United States ex rel. Hall v. *Illinois*, 329 F. 2d 354, certiorari denied, 379 U.S. 891	30
Way v. *United States*, 276 F. 2d 912	30
Whiting v. *United States*, 321 F. 2d 72, certiorari denied, 375 U.S. 884	30

Statutes:

21 U.S.C. (1964 ed. Supp. V):	
Sec. 331(q)(1)	2
Sec. 331(q)(2)	2
Sec. 360a(a)	2
Sec. 360a(b)	2

Miscellaneous:

DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application 1* U. San Fran. L. Rev. 243 (1967)	11
Model Penal Code	21
Proposed Official Draft, 1962	20
Tentative Draft No. 9, 1959	20
Note, *Applying Estoppel Principles in Criminal Cases*, 78 Yale L.J. 1046 (1969)	27
Note, *The Serpent Beguiled Me and I Did Eat—The Constitutional Status of the Entrapment Defense*, 74 Yale L.J. 942 (1965)	30
Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 Duke L.J. 39	27
Proposed New Federal Criminal Code (1971), Final Report of the National Commission on Reform of Federal Criminal Laws	19, 20, 21
Ratner, *The Function of The Due Process Clause*, 116 U. Pa. L. Rev. 1048 (1968)	19
Rotenberg, *The Police Detection Practice of Encouragement*, 49 Va. L. Rev. 871 (1963)	25

Cases—Continued

United States v. Knight, C.A. 9, No. 72-2031, decided October 16, 1972 18
United States v. Rose, 172 F. 2d 279, certiorari denied, 338 U.S. 860 23
United States ex rel. Hall v. Tillson, 329 F. 2d 394, certiorari denied, 379 U.S. 891 30
Hall v. United States, 376 F. 2d 912 30
Whitney v. United States, 321 F. 2d 72, certiorari denied, 375 U.S. 954 30

Statutes:

21 U.S.C. (1964 ed. Supp. V):
Sec. 331(q)(1) 2
Sec. 331(q)(2) 2
Sec. 360a(a) 2
Sec. 360a(b) 2

Miscellaneous:

DeFeo, Enforcement as a Defense in Criminal Responsibility: An Historical Theory and Application I U. San Fran. L. Rev. 213 (1967) 11
Model Penal Code 21
Proposed Official Draft, 1962 20
Tentative Draft No. 9, 1959 20
Note, Applying Estoppel Principles to Criminal Cases, 75 Yale L.J. 1016 (1966) 27
Note, The Supreme Court and Due Process—The Constitutional Status of the Entrapment Defense, 74 Yale L.J. 982 (1965) 30
Orfield, The Federal Criminal Code 27
Federal Crimes, 1957 Univ. L.J. 39
Proposed New Federal Criminal Code (1971) 27
Final Report of the National Commission on Reform of Federal Criminal Laws 18, 20, 21
Rantor, The Function of The Due Process Clause, 116 U. Pa. L. Rev. 1095 (1968) 10
Rotenberg, The Police Defense Precede of Entrapment, 49 Va. L. Rev. 871 (1963) 25

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1585

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD RUSSELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals is reported at 459 F. 2d 671.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1972. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including June 5, 1972. The petition was filed on that date and was granted on October 16, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether in the circumstances of this case the fact that a government agent furnished one of the means for the commission of an offense, which the defendant was concededly predisposed to commit and did commit, establishes a bar to prosecution as a matter of law.

STATEMENT

After a jury trial with co-defendant Patrick Connolly in the United States District Court for the Western District of Washington, respondent was convicted on three counts of having unlawfully manufactured and processed methamphetamine and of having unlawfully sold and delivered that drug, in violation of 21 U.S.C. (1964 ed. Supp. V) 331(q)(1), (2) and 360a(a), (b).[1] Respondent was sentenced to concurrent prison terms of two years, suspended on condition that he serve six months in jail followed by three years' probation. On appeal, the court reversed the convictions, one judge dissenting, and ordered the indictment dismissed (Pet. App. 12–21).[2] The court concluded that prosecution should be barred because of what it believed was "an intolerable degree of governmental participation in the criminal enterprise",

[1] The indictment was in five counts but only three (counts 2–4) charged respondent. Patrick Connolly was convicted on all five counts; John Connolly was named as a defendant but did not appear for trial.

[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "App." refers to the joint appendix in this Court; "Tr." refers to the transcript of proceedings at trial also on file with the Clerk.

involvement which it found "repugnant" (Pet. App. 14, 17).

1. The facts are not in dispute. On December 7, 1969, Agent Shapiro of the Federal Bureau of Narcotics and Dangerous Drugs, acting in an undercover capacity, met with respondent and his co-defendants, Patrick Connolly and John Connolly, at respondent's home on Whidbey Island, Washington. The purpose of Agent Shapiro's undercover mission was to locate a laboratory where he had reason to believe that methamphetamine ("speed") was being illegally produced (App. 14; Tr. 83). Shapiro told respondent and the Connollys that he represented an organization in the Pacific Northwest interested in controlling the manufacture of methamphetamine; that he wanted to purchase methamphetamine from them; and that he would supply one of the chemicals, phenyl-2-propanone, necessary to the manufacture of the drug, in return for one-half the amount of methamphetamine produced (App. 3–4; Tr. 3–6). In the course of the discussions Patrick Connolly told Shapiro that he had been manufacturing methamphetamine since May 1969 and had produced about three pounds of that drug.[4] Shapiro indicated that before he furnished any phenyl-2-propanone he wanted to see their laboratory and a sample of their methamphetamine (App. 5; Tr. 7–8). John Connolly then gave Shapiro a bag containing a

[4] Patrick Connolly admitted in his testimony that he had told Shapiro that he had manufactured three pounds of methamphetamine prior to the meetings, but he asserted that his statement had been untrue (Tr. 148–149).

quantity of methamphetamine, stating that it was from "the last batch that we made"; shortly thereafter Shapiro left with Patrick Connolly to view the laboratory which was in the latter's home on Whidbey Island. In the laboratory Shapiro saw an empty bottle labeled phenyl-2-propanone (App. 5-6; Tr. 8-9).

On the evening of December 9, 1969, Shapiro met with Patrick Connolly and respondent at the laboratory. Respondent and Connolly prepared a large flask with pieces of aluminum foil and other chemicals. At Connolly's request Shapiro provided him with a bottle containing 100 grams of phenyl-2-propanone, which Connolly added to the flask (App. 6-8; Tr. 19-22). During that night, Connolly and respondent manufactured a batch of methamphetamine (App. 7-9; Tr. 22-24).[4] The next morning Shapiro received part of the drug pursuant to their agreement and the rest was given to respondent. Shapiro later agreed to purchase some of respondent's portion of the methamphetamine for $30 (App. 10; Tr. 24, 27-31, 89-90).

On January 7, 1970, Shapiro met again with Patrick Connolly and asked if he was still interested in their "business arrangement." Connolly said that he was but that he had recently acquired two bottles of phenyl-2-propanone and would not be finished with those for a few days (App. 10-11; Tr. 33, 96). Shapiro obtained additional methamphetamine from Connolly at that time (App. 11; Tr. 33-34, 103-104). On January 10, 1970, Shapiro returned to Connolly's residence with a search warrant and seized, among other items, an

[4] Shapiro put in some pieces of foil that had fallen to the floor but did not otherwise participate in the manufacturing process or direct the work (App. 12; Tr. 71-72, 87).

empty 500 gram bottle of phenyl-2-propanone and a 100 gram bottle partially filled with that substance (App. 11–12; Tr. 35, 45–46, 50, 95–96). The 100 gram bottle was not the one previously supplied by Agent Shapiro (App. 12; Tr. 50).

Agent Shapiro testified on cross-examination that a number of chemical supply firms had voluntarily ceased selling phenyl-2-propanone at the request of the Federal Bureau of Narcotics and Dangerous Drugs. The chemical may, therefore, have been generally difficult to obtain around December 9, 1969 (App. 14; Tr. 82), although there were no legal restrictions on its manufacture and sale. Both Shapiro and a government chemist testified that phenyl-2-propanone is an essential ingredient in the method used by respondent and Connolly to manufacture methamphetamine (App. 15; Tr. 84–85, 112–113).

At his trial for manufacturing, processing, possessing, and selling a controlled drug, respondent did not testify or introduce any evidence. He made motions for acquittal, which were denied, based on a claim of entrapment stemming from Agent Shapiro's participation in the offense (Tr. 114–118, 161). On appeal respondent acknowledged that the jury had been properly instructed on the defense of entrapment[3] and that

[3] The district judge gave the Ninth Circuit's approved instruction on entrapment, which admonished the jury to acquit if under the evidence it had a "reasonable doubt whether the defendant had the previous intent or purpose to commit the offense * * * and did so only because he was induced or persuaded by some officer or agent of the government" (App. 17–18; Tr. 170–180).

> * * * concededly, here we do not have an issue of propensity, because the defendant through hearsay statements stated that he did sell speed and associated with Connolly who manufactured speed. The jury could find from the testimony that the government had not unlawfully entrapped Russell and that Russell did commit the acts as charged. There is no question that Russell committed the acts. [Pet. App. 18 quoting Brief p. 7.]

2. Even though respondent had concededly harbored a predisposition to commit the offense, and thus the jury properly refused to accept his entrapment defense as it has been defined in the decisions of this Court, the court of appeals reversed respondent's conviction and ordered the indictment dismissed. The court held that the conduct of the federal undercover agent in supplying an ingredient needed to manufacture the illicit drug constituted "an intolerable degree of governmental participation in the criminal enterprise" (Pet. App. 14), and that its determination to this effect barred prosecution. The determination was apparently based upon the factual assumption that "there could not have been the manufacture, delivery, or sale of the illicit drug had it not been for the Government's supply of one of the essential ingredients" (Pet. App. 13) and that respondent "would have been powerless to 'commit' the charged offense without the Government's pervasive intervention" (Pet. App. 15).

The majority opinion initially suggested "two theories" under which this holding could be justified: (1) "Placing the defense within the ambit of the en-

trapment doctrine" as it had been enlarged by two other lower courts (Pet. App. 14) or (2) creating a new defense based on the degree to which the government becomes "enmeshed in criminal activity" and allegedly resting on "the same underlying objections which render entrapment repugnant to American criminal justice" (Pet. App. 16, quoting from *Greene v. United States*, 454 F.2d 783, 787 (C.A. 9)). After discussing the two theories, the court of appeals concluded that "the only difference * * * is the label affixed to the result" (Pet. App. 17):

> Both theories are premised on fundamental concepts of due process and evince the reluctance of the judiciary to countenance "over zealous law enforcement." We do not choose to affix a label to our result; hence, we need not select between the alternative theories. Here, both compel the same disposition. [Footnote omitted.]

Judge Trask, dissenting, disapproved of the majority's "unnecessary effort to enlarge the doctrine of entrapment beyond the limitations of * * * *Sherman v. United States*, 356 U.S. 369" (Pet. App. 21); he also emphasized that the majority's factual assumptions were not supported by the record, since respondent had obtained phenyl-2-propanone for the manufacture of methamphetamine from sources of his own both before and after being supplied with that ingredient by Agent Shapiro (Pet. App. 19–21).

SUMMARY OF ARGUMENT

In *Sorrells* v. *United States*, 287 U.S. 435, 441, this Court took note of the "well settled * * * [rule] * * * that the fact that officers or employees of the Govern-

ment merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." The Court also expressly approved the use of "[a]rtifice and stratagem" to catch those engaged in criminal conduct, stating that the "appropriate object of the permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law." The principal limitation on the "permitted activity," inherent in the policy considerations which justify the use of "artifice and stratagem," is that the government officials not "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute" (287 U.S. at 442).

Respondent here was conspiring with several other persons who were engaged in the production and sale of an illicit drug. It was conceded in the court below that he was not an "innocent person" beguiled into criminal activity, and that his predisposition to commit the offense was not in issue in the case. Moreover, it was likewise conceded that "the jury could find from the testimony that the government had not unlawfully entrapped [respondent]" (Pet. App. 18).

The court of appeals erred in holding that respondent's conviction for the manufacture and sale of an illicit drug could not be sustained because an undercover agent—seeking "to expose * * * illicit [drug]

traffic"—provided a chemical used in the production of the drug which respondent and his accomplices had manufactured. The court reached this conclusion in the face of a record which clearly established that both prior to and after their association with the undercover agent here, respondent and his accomplices manufactured the drug using the same chemical ingredient obtained from other sources.

The holding of the court of appeals, despite the claim in its opinion, is wholly inconsistent with the well settled principles established by this Court and finds no support in the basic considerations underlying the entrapment defense: that law enforcement officers not play on "the weakness of an innocent party and beguile him into committing crimes which he would not otherwise have attempted." *Sherman* v. *United States*, 356 U.S. 369, 376.

The conclusion of the court of appeals that the conduct of the undercover agent constituted a violation of "fundamental concepts of due process", independent of an entrapment defense, is at odds with decisions of this Court defining appropriate police investigative activity. These cases recognize that, consistent with accepted notions of fairness, a person may be prosecuted for engaging in particular criminal activity, despite government inducement or solicitation, if that action is appropriate to the detection of criminal activity and if the offense for which he is prosecuted is essentially a substitute for a similar criminal act which would have been committed without government participation.

Applying these accepted principles here it is plain that the undercover agent's activity did not violate due process. The holding of the majority to the contrary establishes an arbitrary exception to the well settled rule based on a single isolated fact having nothing whatever to do with objections underlying participation by undercover agents in criminal activity or accepted notions of fairness. This arbitrary and unreasonable exception should be rejected by this Court.

ARGUMENT

THE ACTIVITY OF THE GOVERNMENT AGENT IN THIS CASE DID NOT CONSTITUTE ENTRAPMENT OR DENY RESPONDENT DUE PROCESS

Despite the fact that respondent admittedly "harbored a predisposition to commit the charged offenses" (Pet. App. 13), that there was no substantial government inducement to commit the offense, and that petitioner was engaged in the illicit manufacture of these drugs both before and after the commission of the offense charged here, the majority below reversed the conviction. The touchstone of its decision was that the government supplied one of the essential ingredients of the illicit drug and that without that ingredient, "there could not have been the manufacture, delivery or sale of the illicit drug * * *" (Pet. App. 13).

This approach of the court below is, we submit, wholly at odds with the underlying nature of the entrapment defense as expressed in prior decisions of this Court. In the light of those decisions, the conduct of the undercover agent in this case was not entrap-

ment. Rather it was quite proper and within the scope of investigatory practices recognized by this Court as "necessary weapons in the arsenal of the police officer." *Sherman* v. *United States*, 356 U.S. 369, 372. The alternative due process theory upon which the decision below is said to rest is likewise untenable. On one level it is simply a way of avoiding the established doctrine of entrapment developed by this Court. On another level it introduces an ambiguous and vague standard for testing the validity of governmental investigative conduct. The terms "intolerable" and "repugnant" when used to characterize government investigative activity are not susceptible to ready application in the course of legitimate undercover work. While there might be rare cases to which the due process clause would apply, the adoption of the vague test enunciated below can only inhibit legitimate undercover activity.[6]

A. THE DECISION BELOW IS INCONSISTENT WITH ANY VIEW HERETOFORE RECOGNIZED BY THIS COURT AS TO THE NATURE OF THE DEFENSE OF ENTRAPMENT AND SHOULD NOT BE ADOPTED

1. This Court has dealt with the defense of entrapment infrequently.[7] The Court first recognized the

[6] The court of appeals treated these inquiries as a question of law, which it resolved finally itself, reversing the conviction with directions to dismiss the indictment. Its decision is therefore objectionable on the additional ground that it formulated and applied a value-judgment standard that a jury has never been given an opportunity to consider. See note 12, *infra*.

[7] The history of the entrapment defense is traced in DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U. San Fran. L. Rev. 243, 244–252 (1967).

defense in 1932 in *Sorrells* v. *United States*, 287 U.S. 435, a prosecution under the National Prohibition Act for selling whiskey to an undercover federal agent. The evidence as summarized in the majority opinion of Chief Justice Hughes was deemed "sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation." 287 U.S. at 441. The question before the Court was whether, on these facts, the rulings of the courts below that there was *no* entrapment as a matter of law were correct. Eight justices of this Court thought the rulings erroneous[1] but divided sharply over the nature of the entrapment defense. Chief Justice Hughes, writing for five members of the Court, held that the doctrine of entrapment was predicated on the view that Congress could not have intended that the "processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons *otherwise innocent* in order to lure them to its commission and to punish them." 287 U.S. at 448 (emphasis added). The Court noted favorably the well established principle that (287 U.S. at 441) "the fact that officers or employees of the Government merely af-

[1] Justice McReynolds alone indicated that he would have affirmed the conviction. 287 U.S. at 453.

ford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." It stated, however, that (287 U.S. at 442): "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an *innocent* person the disposition to commit the alleged offense and induce its commission in order that they may prosecute" (emphasis added).

The opinion of the majority further stated (287 U.S. at 451):

> [T]he defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises. [Citation omitted]. The predisposition and criminal design of the defendant are relevant. *But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.* If that is the fact, common justice requires that the accused be permitted to prove it. The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. * * * [emphasis added].

The Chief Justice's opinion thus left no doubt that the defense of entrapment which the Court was then recognizing was not primarily focused on the propriety of the conduct of government agents but rather was directed to the issue of the subjective guilt of the defendant and as such involved an inquiry into his predisposition to commit the offense. That is, the entrapment defense was not viewed as a way of punishing the government for improper conduct by exonerating an "otherwise guilty" person.[9]

This Court next dealt with the entrapment defense in *Sherman* v. *United States*, 356 U.S. 369, which involved a conviction for selling narcotics to a government informer. All nine justices agreed that, on the evidence,[10] entrapment was established as a matter of law. The Court, however, divided once again over the

[9] The concurring opinion of Mr. Justice Roberts for three members of the Court approached the issue somewhat differently. He contended that the basis for an entrapment defense should be a rule of "public policy" based upon the purity of the judicial process rather than upon imputed congressional intent. He emphasized, to a greater degree, the concern about improper governmental conduct and indicated that the rationale for the defense ought not to be the innocence of the defendant but "the inherent right of the court not to be made the instrument of wrong." The opinion concluded that where inducement or instigation by the government was shown, the prosecution should not be permitted in rebuttal to introduce evidence of the defendant's predisposition. See 287 U.S. at 453–459.

This difference in approach also resulted in a disagreement between the concurring justices and the majority as to who (court or jury) should determine whether entrapment is established, and whether it should make any difference what type of crime is involved. See 287 U.S. at 455, 457–458.

[10] The facts as detailed in Chief Justice Warren's opinion for the Court showed that the informer met the defendant at a doctor's office where both were receiving treatment to be cured of

elements of the entrapment defense. The Chief Justice, writing for the majority, held that reversal was required under the rationale of the majority in *Sorrells*, which it adopted and summarized as follows (356 U.S. at 372-373):

> In *Sorrells* v. *United States*, 287 U.S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U.S., at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that

narcotics addiction. After several such accidental meetings, the informer asked the defendant if he knew of a source of narcotics since he (the informer) was not responding to treatment. The defendant attempted to avoid the issue but "after a number of repetitions of the request, predicated upon [the informer's] presumed suffering," he acquiesced. Thereafter he purchased narcotics on several occasions from the source and shared them with the informer, collecting from the informer a portion of the purchase price. The informer ultimately reported the defendant's activities to federal agents, who then observed sales of narcotics by the defendant to the informer. 356 U.S. at 371.

its statutes were to be enforced by tempting innocent persons into violations.

However, the fact that government agents "merely afford opportunities or facilities for the commission of the offense does not" constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of the *creative* activity" of law-enforcement officials. [Emphasis in original.] See 287 U.S., at 441, 451. To determine whether entrapment has been established, *a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.* [Emphasis added.] The principles by which the courts are to make this determination were outlined in *Sorrells*. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on his claim of innocence. See 287 U.S., at 451.

The Court thus adhered to the majority view in *Sorrells* that the entrapment doctrine rests on a claim of subjective innocence which may be undermined by proof of the defendant's predisposition to commit the crime notwithstanding the government's instigation or persuasion.[11] Moreover, the Court rejected the sugges-

[11] The majority also discussed the effect of the government's evidence of the defendant's two previous narcotics convictions, offered to prove his "readiness" to sell narcotics to the informer. While deeming the attempt to show the defendant's predisposition relevant, the majority found the evidence insufficient to "prove [defendant] had a readiness to sell narcotics at the time [the informer] approached him" in light of the other evidence introduced on this issue, and the fact that the convictions occurred many years before the events in question. 356 U.S. at 375–376.

tion in Mr. Justice Frankfurter's concurring opinion that it "reassess the doctrine of entrapment according to principles announced in the separate opinion of Mr. Justice Roberts in *Sorrells* v. *United States*, 287 U.S. 435, 453." 356 U.S. at 376. The Court stated in this regard (356 U.S. 376–377):

> * * * Mr. Justice Roberts asserted that although the defendant could claim that the Government had induced him to commit the crime, the Government could not reply by showing that the defendant's criminal conduct was due to his own readiness and not to the persuasion of government agents. The handicap thus placed on the prosecution is obvious. * * *

In this regard, the Court quoted (356 U.S. at 377 n. 7) from Judge Learned Hand's opinion in earlier proceedings in the case:

> "Indeed, it would seem probable that, if there were no reply [to the claim of inducement], it would be impossible ever to secure convictions of any offences which consist of transactions that are carried on in secret." *United States* v. *Sherman*, 200 F. 2d 880, 882."

In two subsequent cases involving an entrapment claim, the Court found it unnecessary to reexamine the question disputed in *Sorrells* and *Sherman* as to the appropriate doctrinal foundation for the entrap-

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"The Court in *Sherman* also specifically reaffirmed the holding in *Sorrells* "that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." 356 U.S. at 377. In *Masciale* v. *United States*, 356 U.S. 386, decided the same day as *Sherman*, the Court, dividing as in *Sherman*, held that since the testimony on entrapment was conflicting, the issue was properly submitted to the jury.

ment defense. In *Osborn* v. *United States*, 385 U.S. 323, a prosecution for endeavoring to bribe a member of the jury panel in a prospective criminal trial, this Court rejected a contention that entrapment had been established as a matter of law under *Sherman* and *Sorrells*, stating (385 U.S. at 331–332):

> Surely it was not a "trap for the unwary innocent," *Sherman* v. *United States*, 356 U.S. 369, 372, for Vick [an informer] to tell the petitioner, truthfully, that he knew some of the members of the jury panel and that one of them was his cousin [Elliot]. And according to Vick he had said no more when the petitioner "jumped up," went out into the alley with him and initiated the effort to get Elliott "on our side." At the most, Vick's statement afforded the petitioner "opportunities or facilities" for the commission of a criminal offense, and that is a far cry from entrapment. *Sherman* v. *United States*, *supra*, at 372; *Sorrells* v. *United States*, 287 U.S. 435, 441 [footnote omitted].

See, also *Lopez* v. *United States*, 373 U.S. 427, 434, where the Court found that "under any approach," the defendant's claim of entrapment was insubstantial.

2. We have set out the entrapment rationale developed by this Court in some detail to emphasize the fundamental differences between the principles underlying the entrapment defense and the holding of the court below.[18]

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[18] A recent decision of the same court marks a further departure from the established rationale of the entrapment defense. In *United States* v. *Knight*, No. 72-2081, decided October 16, 1972, heroin had passed from an illegal source, through an informer who acted merely as a conduit, to the defendant and then to his accomplice. The court of appeals affirmed a district court order suppressing the heroin on the ground that probable cause to arrest

The court of appeals recognized that it was departing from the established standards and purported to rely on the concurring opinion of Mr. Justice Frankfurter in *Sherman*. But that opinion, whatever its precedential value in view of the majority's refusal to reconsider the basis of the entrapment defense, lends no support to the test adopted here. While it is true that Mr. Justice Frankfurter, like Mr. Justice Roberts in *Sorrells*, advocated an entrapment defense predicated on the nature of police conduct, he emphasized that (356 U.S. 383–384):

> This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. * * * [13]

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and search the accomplice could not be based on her possession of the heroin which had passed through the informer.

[13] We question whether it is a proper exercise of the judicial function to create a substantive immunity from punishment for conduct proscribed by Congress. Ratner, *The Functions of the Due Process Clause*, 116 U. Pa. L. Rev. 1048, 1063–1068 (1968). The traditional entrapment defense is based on the reasonable assumption that Congress did not intend the "otherwise innocent" to be punished for being impelled by the government to commit generally forbidden acts. But there is no basis in fact or theory for

Plainly on the facts here, the undercover agent acted only to "detect those engaged in criminal conduct" who were "ready and willing to commit further crime should the occasion arise." The undercover agent merely told respondent and his co-defendants

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assuming that the legislature implicitly intends that those "otherwise predisposed to crime" should receive immunity for actual violations of criminal statutes simply to punish an investigator for engaging in conduct "likely" to have tempted a law-abiding citizen.

The objective test formulated by Justice Roberts in *Sorrells* and by Justice Frankfurter in *Sherman* is similar to that suggested in the Proposed New Federal Criminal Code (1971), Final Report of the National Commission on Reform of Federal Criminal Laws. Section 702 of the Commission's suggested code defines entrapment as occurring "when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment. The Model Penal Code's formulation is comparable. Section 2.10, Model Penal Code (Tent. Draft No. 9, 1959); Section 2.13, Model Penal Code (Proposed Official Draft, 1962).

There are substantial reasons why it would be unwise as a matter of policy to shift the focus of the entrapment defense from the subjective criminal intent of the accused to the objective tendency of the investigator's conduct. For instance, it does not seem either practical or just to award immunity to a defendant simply because the conduct of the investigator was likely to have caused an innocent person to commit an offense if in fact the investigation involved a person otherwise disposed toward the offense and merely awaiting an opportunity to commit it. Such a rule would seem to confer a wholly gratuitous benefit. Even the exclusionary rule under the Fourth Amendment, which has been criticized as "letting the guilty go free" because "the constable blundered," is designed in part to redress the violation of the *personal* rights of the accused. It has not been considered appropriate to promote the deterrent purpose of that rule by expanding its application to persons whose legitimate interests were *not* in fact violated. See *Alderman* v. *United States*, 394 U.S. 164, 174–175. The present formulation of the entrapment defense, we submit, strikes the proper bal-

that he wished to purchase methamphetamine from them and that he would supply some phenyl-2-propanone, one of the chemicals needed to manufacture the drug, in return for half the methamphetamine produced. This is a "far cry" (*Osborn* v. *United States*, *supra*) from entrapment, since the agent's offer was not likely to induce the commission of crime by persons "who would normally avoid crime and * * * resist ordinary temptations." *Sherman* v. *United States*, *supra*, 356 U.S. at 384 (Mr. Justice Frankfurter concurring).[14]

3. The majority below apparently sought to bring the result here within the scope of this Court's decisions by citing the statement, first appearing in *Sorrells* and later reiterated in *Sherman*, that entrapment occurs when the criminal conduct is the product of the "creative activity" of law enforcement officials. See *Sherman* v. *United States*, *supra*, 356 U.S. at 372. But it is clear that in using the quoted phrase, as well as the phrase "manufacturing of crime" in *Lopez*, *supra*, the Court was not referring to the practice found offensive here of furnishing means for the commission of the offense, but rather to the concept of inducement by the government of the "unwary innocent." The Court's opinions in the entrapment field

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since: it discourages government overreaching by justifying an acquittal whenever there is a reasonable possibility that the defendant on trial may have been an otherwise innocent man induced by the government, but the present formulation does not immunize those who were not in fact seduced from innocence.

[14] Likewise neither the American Law Institute's Model Penal Code nor the Proposed New Federal Criminal Code purport to create an entrapment defense where such inducement is lacking. See note 13, *supra*.

cannot be read as encompassing the possibility of a different defense, to which inducement is irrelevant, based solely on the furnishing of means for the commission of the offense by an undercover agent to persons predisposed and willing to commit it. To the contrary, this Court unequivocally foreclosed the assertion of any such "defense" by emphasizing that where a criminal predisposition is found to exist, "the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Sorrells* v. *United States, supra,* 287 U.S. at 441; *Sherman* v. *United States, supra,* 356 U.S. at 372.

It is true that in neither *Sorrells* nor *Sherman* was this Court presented with a factual pattern precisely like the one in this case. But no substantial reasons are suggested for departing here from the principles enunciated in those cases. The "underlying objections which render entrapment repugnant to American criminal justice," on which the majority purported to rely (Pet. App. 16), derive from "a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise reject." See *United States* v. *Becker,* 62 F. 2d 1007, 1009 (C.A. 2) (L. Hand, J.). As Chief Justice Warren stated in *Sherman,* the defense of entrapment is intended to curtail "[l]aw enforcement * * * methods" which play "on the weaknesses of an innocent party and beguile him into committing crimes which he otherwise would not have attempted" (356 U.S. at 376). The conduct of the undercover agent here in no way offended these policies.

Moreover, the two courts of appeals decisions relied upon by the majority, *United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5), and *Greene* v. *United States*, 454 F. 2d 783 (C.A. 9), are factually distinguishable from the present case. While we believe both to have been wrongly decided under the majority opinion in *Sherman* and *Sorrells*, they involve a degree of government participation and inducement far in excess of that present here. In *Bueno* an informer purchased heroin, shared it with the defendant who was a drug addict, repeatedly asked him to attempt a sale of the heroin which the informer was to provide, and apparently arranged for a sale to an undercover agent. On these facts, the court concluded that the defendant had been entrapped as a matter of law.

The Ninth Circuit's earlier decision in *Greene*, *supra*, likewise involved a case of extensive government involvement including the construction of an illegal still and its operation over a prolonged period of time, and accompanied by overbearing inducement and veiled threats of physical injury. A divided court of appeals held that because of this activity the conviction could not be sustained. But the court was careful to note that "the Government through its [undercover agent] did not simply attach itself to an ongoing bootlegging operation for the purpose of closing it down and prosecuting the operators. * * * [R]ather the procedure followed by the [undercover agent] * * * helped first to reestablish, and then to sustain, criminal operations which had ceased * * *" (454 F. 2d at 787).

Those cases bear little relation to the facts in the present case, where on the basis of prior leads, the government through its undercover agent attached itself briefly to what the record indicated was an "on-going" illicit drug laboratory "for the purpose of closing it down and prosecuting its operators." [15] Compare *Sorrells* v. *United States*, 4 F. 2d 87 (C.A. 6).

6. It is thus plain that the new entrapment defense adopted by the court below is in reality nothing more than an arbitrary exception to the well settled rule that furnishing "opportunites and facilities" for the commission of crime is "appropriate" and often "essential" to the detection of those engaging in that activity. *Sorrells* v. *United States*, *supra*, 287 U.S. at 441-442. The furnishing of "opportunities and facilities" that aid in the conduct of a criminal enterprise is a traditional and indispensable tactic for conducting undercover investigations. It is frequently necessary for the undercover agent to furnish such aid in order to convince the suspects that he is a genuine partici-

[15] A third case relied upon by the court below was a district court decision which held that a defendant who approached a notorious counterfeiter and asked to purchase counterfeit money for resale could not be prosecuted for possession of counterfeit bills, where after the approach was made, the counterfeiter reported it to the Secret Service, which provided the counterfeit bills through an undercover agent to whom the counterfeiter had introduced the defendant. *United States* v. *Chisum*, 312 F. Supp. 1207 (C.D. Cal.). Cf. *People* v. *Strong*, 21 Ill. 2d 290, 172 N.E. 2d 765; *United States* v. *Dillet*, 265 F. Supp. 280 (S.D.N.Y.). We submit that *Chisum* was wrongly decided for many of the same reasons that warrant reversal of the judgment below. We have filed a petition for a writ of certiorari in *United States* v. *McGrath*, No. 72-761, filed November 22, 1972, seeking review of a decision by the Seventh Circuit reaching a conclusion similar to that in *Chisum*.

pant. Other investigations, particularly in drug cases, depend on probing leads about criminal activity by offering to purchase contraband and sometimes supplying the financing with which a seller obtains the drugs from his supplier. In other cases, in pursuing the investigation to its fruition, an undercover agent must furnish money to buy tools needed in the crime, or provide a car, or allow the use of his premises to plan the crime. See, *e.g.*, *Johnson* v. *United States*, 317 F. 2d 127 (C.A.D.C.); cf. *United States* v. *Roett*, 172 F. 2d 379 (C.A. 3), certiorari denied, 336 U.S. 960. Yet there is no difference, in terms of the entrapment rationale adopted by this Court, between the furnishing of such assistance and the supplying of one of the components of the illicit drug in this case. Such governmental conduct is not crime-creating in the only sense condemned in *Sorrells* and *Sherman*, *i.e.*, creating the disposition in innocent persons to commit the offense.[14]

B. THERE WAS NO VIOLATION OF DUE PROCESS IN THIS CASE

Without detailed exposition, the court below also held that the law enforcement activity in this case violated governing standards of due process.

The decision voiding respondent's conviction on due process grounds appears to rest on the statement by the court of appeals that an indictment returned after an "intolerable degree of government participa-

[14] See generally Rotenberg, *The Police Detection Practice of Encouragement*, 49 Va. L. Rev. 871, 873–874, 876 (1963), explaining some of the circumstances in which methods of investigation and detection other than "encouragement" are "simply inadequate."

tion in the criminal enterprise" contravenes "fundamental concepts of due process". In this case, the court also termed the agent's conduct "repugnant" (Pet. App. 17). The majority opinion is not altogether clear as to the basis upon which it concluded that the degree of government participation here was "intolerable": although the majority held that respondent "would have been powerless to 'commit' the charged offense without the Government's pervasive intervention" (Pet. App. 15), the opinion appears to acknowledge that the chemical supplied by the undercover agent could have been obtained independently, albeit possibly with some "difficulty", through legitimate channels (Pet. App. 13).[16]

Moreover, the court made no real effort to reconcile its holding—freeing a person who was concededly engaged in the production and sale of illicit drugs both before and after the agent's "intervention"—with the well established principle, discussed above, permitting government participation for the purpose of detecting on-going criminal activity. Although the majority purported to find support for its position in the concurring opinion of Justice Frankfurter in *Sherman* that opinion, as we have already shown, lends no support to the result reached here.[17]

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[16] The difficulty in obtaining the chemical from legitimate sources was not due any legal restrictions on the manufacture and sale of phenyl-2-propanone—in fact there were none, but because the Bureau of Narcotics and Dangerous Drugs had succeeded in persuading a member of chemical supply firms to cease selling the drug (App. 14; Tr. 87).

[17] *Raley* v. *Ohio*, 360 U.S. 423, cited by the majority below is inapposite. That case involved governmental advice to wit-

We do not here challenge the proposition that under certain circumstances government participation in a criminal venture might reach a level of direction and control that would make it a violation of the due process clause to prosecute the people who acquiesce in what would be essentially the government's enterprise. We submit, however, that a determination of the circumstances under which such conduct is found to violate the due process clause cannot be made in a vacuum, but must be made in the context of "accepted notions of justice." See *Malinski* v. *New York*, 324 U.S. 401, 416–417 (Frankfurter, J., concurring). See also *Rochin* v. *California*, 342 U.S. 165, 170–171. Viewing the conduct of the undercover agent here in this light, it is plain that the isolated fact upon which the majority appeared to rest its holding—the supplying of the phenyl-2-propanone—does not justify the holding that the respondents' conviction offends "fundamental concepts of due process."

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nesses that they were entitled to refuse to answer questions under the privilege against self-incrimination, followed by prosecution for their failure to answer because the privilege was not available. The Court held it a denial of due process to convict a witness who justifiably relied on advice by government officials that he was constitutionally privileged to remain silent. The basis for the defense in *Raley*, with which we have no quarrel, is that an individual must have fair notice of what conduct will render him subject to criminal prosecution. See Note, *Applying Estoppel Principles in Criminal Cases*, 78 Yale L.J. 1046 (1969); Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 Duke L.J. 39, 53–54; see also *Cox* v. *Louisiana*, 379 U.S. 559, 569–571. *Raley* and the line of decisions which derive from it hence have little relevance to the defense created here which purportedly rests upon misuse by a government agent of an undercover role.

1. Although the "various protections of the Bill of Rights * * * provide checks upon * * * official deception" (*Lewis* v. *United States*, 385 U.S. 206, 209), this Court has never intimated that the kind of conduct engaged in by the undercover agent in this case overstepped constitutional bounds. Compare *Masvial* v. *United States*, 377 U.S. 201. Indeed this Court has found no constitutional violation arising out of the use of undercover agents and stratagems no less calculated and immediate than the agent's tactic in this case.

In *Lewis* v. *United States*, *supra*, for example, the Court sustained a conviction for selling marihuana where the sale was made to an undercover agent who initiated the transaction by telephoning the defendant and asking to be supplied with marihuana. See also *Osborn* v. *United States*, 385 U.S. 323.[18] These cases illustrate that this Court has never applied a "but

[18] In a decoy letter case, *Grimm* v. *United States*, 156 U.S. 604, 609–610, this Court held that it was no defense to a prosecution for mailing obscene material that the government had caused the mailing by sending the defendant a letter under an assumed name asking for a supply of obscene photographs. The court stated (156 U.S. at 610): "The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defence that he would not have violated the law if inquiry had not been made by such government official." See also *Andrews* v. *United States*, 162 U.S. 420.

Mr. Justice Frankfurter in his concurring opinion in *Sherman*, 356 U.S. 382, cited *Grimm* approvingly with the comment that it is "perfectly clear" that the police may "simply furnish the opportunity for the commission of the crime * * *"

for" test in determining the permissible extent of participation by law enforcement agents in the crime. Certainly, it has not been considered improper or unfair to prosecute an offender for a crime, on the ground that he would not have committed that *particular* crime had not the undercover agent been involved. What suffices to make such a person the fair object of prosecution is, in the words of Justice Frankfurter, his "general intention or predisposition to commit, whenever the opportunity should arise, crimes of the kind solicited * * *." *Sherman* v. *United States, supra,* 356 U.S. at 382; see, also, *Trent* v. *United States,* 284 F. 2d 286, 288, n. 2 (C.A.D.C.) (Burger, J.). Thus this Court has allowed ample leeway for undercover agents to play their investigative roles and has not disturbed convictions based on the claim that the crime would not have been committed in the absence of governmental participation.

These results are but particularized applications of the settled notion that, "in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents." *Lewis* v. *United States,* 385 U.S. 206, 208–209, and cases cited; see also *Sherman* v. *United States, supra,* 356 U.S. 372. This Court has recognized that "artifice and stratagem" are "frequently essential to the enforcement of the law." *Sorrells* v. *United States, supra,* 287 U.S. at 441–442. Courts and commentators have particularly observed that drug offenses are a "prime example" of the kind of crimes suitable for undercover activity since they are "committed in secret under such circumstances that perpetration might never be dis-

covered if government representatives were not permitted to participate to some extent." *Whiting* v. *United States*, 321 F. 2d 72, 76 (C.A. 1), certiorari denied, 375 U.S. 884.

The decisions in *Sorrells* and *Sherman*, of course, define the limits of permissible government participation. Together with the holdings discussed above, they recognize that punishment may be imposed for particular criminal activity, despite government inducement or solicitation, provided such action is appropriate in the detection of criminal activity and that the suspect was not an otherwise innocent citizen not disposed toward committing the crime until seduced by government action. See generally Note, *The Serpent Beguiled Me And I Did Eat—The Constitutional Status of the Entrapment Defense*, 74 Yale L. J. 942, 949 (1965)."

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[19] The opinions of the court of appeals have been unanimous in holding that in these circumstances government participation does not offend due process. Collateral attacks by state and federal prisoners have, therefore, been denied when based on the defense of entrapment. See, *e.g.*, *United States ex rel. Hall* v. *Illinois*, 329 F. 2d 354 (C.A. 7), certiorari denied, 379 U.S. 891; *Simmons* v. *United States*, 302 F. 2d 71 (C.A. 8); *Turner* v. *United States*, 262 F. 2d 643 (C.A. 8); *Way* v. *United States*, 276 F. 2d 912 (C.A. 10); *Benson* v. *Carter*, 396 F. 2d 319 (C.A. 9). Compare *Banks* v. *United States*, 249 F. 2d 672 (C.A. 9), with *Banks* v. *United States*, 258 F. 2d 318, 319 (C.A. 9), certiorari denied, 358 U.S. 886. See, also, *LeDent* v. *Wolff*, 334 F. Supp. 64 (D. Neb.); *State* v. *Kasai*, 27 Utah 2d 326, 495 P. 2d 1265, 1267; *People* v. *Washington*, 81 Ill. App. 2d 162, 165, n. 1, 225 N.E. 2d 673, 674, n. 1; *People* v. *Sinclair*, 30 Mich. App. 473, 186 N.W. 2d 767, 771, reversed on other grounds, 387 Mich. 91, 194 N.W. 2d 878; *Hawthorne* v. *State*, 43 Wis. 2d 82, 93, 168 N.W. 2d 85, 91.

Applying these "accepted notions of justice" here, the undercover agent's activity was consistent with the requirements of fundamental fairness.

The undercover agent testified that his purpose in the investigation was to locate the laboratory where the illicit drug was being made (App. 14; Tr. 83). To do so the agent could not operate in the posture of a mere arms-length purchaser but had to infiltrate the group itself; his decision to accomplish this by offering to supply one of the chemical ingredients cannot be said to have been inappropriate to achieve his legitimate objective. The undercover agent did not threaten, cajole, or importune respondent and his confederates to induce them to manufacture a dangerous drug they were not otherwise reading and willing to produce. Moreover, as indicated in the statement, aside from supplying some phenyl-2-propanone, the undercover agent lent no aid to respondent's illegal venture. Respondent and his co-defendants provided the other ingredients, the labor, and the equipment needed to produce the methamphetamine. The finding of the majority that respondent "would have been powerless to 'commit' the offense without the Government's pervasive intervention," apparently based on its belief that the chemical could not otherwise have been obtained, is contrary to the record which clearly established that respondent and his cohorts were able to obtain the phenyl-2-propanone independently both before and after the agent's "inter-

vention". (See *supra*, pp. 2-5). As Judge Trask wrote in his dissenting opinion:

> It is clear from this testimony that while Phenyl-2-Propanone may have been difficult to obtain, it had been obtained in the past without the assistance of the government agent. We are required in this situation to view the evidence, and all reasonable inferences therefrom, in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60 (1942); *United States* v. *Halprin*, No. 71-2146 (9th Cir. Oct. 20, 1971). Accepting that as true, it is correct that the appellant did use the necessary chemical supplied by the government agent on the date of manufacture for which he was convicted. It is not correct that it was impossible or even difficult for the defendant and his co-conspirators to obtain it from their own sources of supply. Under these circumstances it can hardly be argued that there was an "intolerable degree of governmental participation in the criminal enterprise."

It may be that due process precludes criminal conviction for engaging in conduct that would not have been possible without the participation and assistance of a government agent who supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels. But that is not what the record in this case establishes. Insofar as the court of appeals was applying a different standard in barring prosecution following "overzealous law enforcement" that it considered "repugnant", the decision lacks a

basis in fact here, finds no authority in prior decisions, and erects unwarranted barriers to effective and legitimate law enforcement. The conduct of agent Shapiro in this case was well within the bounds of official action approved by this Court in a variety of contexts, and there was no valid ground for overturning the jury's determination that respondent had engaged in culpable criminal conduct.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the judgment of conviction reinstated.

Respectfully submitted.

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NOVEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972